

No. 15510

United States
Court of Appeals
for the Ninth Circuit

FIDALGO ISLAND PACKING COMPANY, a
Corporation, and CLARA WILSON, .

Appellants,

vs.

A. B. PHILLIPS, Executive Director, Employ-
ment Security Commission of Alaska,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Division Number One.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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COUNSEL OF RECORD

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For Defendant-Appellee:

J. GERALD WILLIAMS,
Attorney General for Alaska,
Juneau, Alaska, by
DICKERSON REGAN,
Juneau, Alaska.



In the United States District Court for the District
of Alaska, Division Number One, at Juneau

No. 6865-A

FIDALGO ISLAND PACKING COMPANY, a
Corporation,

Plaintiff,

vs.

A. B. PHILLIPS, Executive Director, Employ-
ment Security Commission of Alaska,

Defendant,

CLARA WILSON,

Intervenor.

JUDGMENT ON MANDATE

This cause having come on regularly for trial before the Court on April 27, 1954, upon the complaint of plaintiff and the complaint in intervention of the intervenor, Clara Wilson, and the answers of defendants; and plaintiff and intervenor being represented by their attorney, H. L. Faulkner of Faulkner, Banfield and Boochever, and the defendant being represented by its attorney Edward A. Merdes, Assistant Attorney General of Alaska, and the Court having, before the final hearing was completed, substituted A. B. Phillips as defendant in place of John T. McLaughlin, the original defendant; and evidence having been adduced before the Court on behalf of the parties, and arguments having been made by respective counsel for plaintiff, intervenor and defendant and briefs having been filed, and the

cause having been submitted for judgment and the Court having taken the matter under advisement and having thereafter on May 12, 1954, filed its findings of fact and conclusions of law; and having made and filed herein on May 12, 1954, its judgment and permanent injunction in favor of plaintiff and intervenor and against defendant; and an appeal having been taken by defendant to the United States Court of Appeals for the Ninth Circuit at San Francisco and the Court of Appeals having affirmed the judgment entered by the District Court, and a petition for rehearing having been thereafter filed on behalf of the defendant, and the Court having on June 21st, 1956, rendered an opinion denying the petition for rehearing and having thereafter on the 3rd day of July, 1956, entered its mandate which was thereafter on July 6th, 1956, filed in the above-entitled Court and which mandate is in words and figures as follows:

No. 14505

United States of America—ss.

The President of the United States of America:

To: the Honorable, the Judges of the District Court
for the District of Alaska, First Division,
Greeting:

Whereas, lately in the District Court for the District of Alaska, First Division, before you or some of you, in a cause between Fidalgo Island Packing Company, a Corporation, Plaintiff, and John T.

McLaughlin, Acting Executive Director, Employment Security Commission of Alaska, Defendant, No. 6865-A, a judgment is of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof.

And Whereas, A. B. Phillips appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 4th day of May, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed. (September 12, 1955.)

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the Third day of July in the year of our Lord one thousand nine hundred and fifty-six.

PAUL P. O'BRIEN,

Clerk, United States Court of Appeals for the Ninth Circuit.

It Is Now Hereby Ordered, Adjudged and Decreed that, pursuant to the mandate aforesaid, the above-named defendant and his agents, officers and employees and his and their successors in office and each of them, be and they are hereby enjoined from doing any act or thing for the purpose of enforcing or putting into effect purported regulation No. 10 of the Employment Security Commission of Alaska which is dated June 29, 1953, and which pretends to set up seasons of employment of all those persons and corporations engaged in salmon packing in Alaska, and a copy of which regulation is set forth in the plaintiff's complaint in paragraph 6 thereof and,

It Is Further Ordered, Adjudged and Decreed that all funds of the Employment Security Commission of Alaska in the total sum of \$650,000, impounded by order of the Court of the 25th day of June, 1954, pending the outcome of the appeal of this cause to the United States Court of Appeals, be and they are hereby ordered released from the order impounding them and,

It Is Further Ordered, Adjudged and Decreed that the impounded funds be used by the Employ-

ment Security Commission to pay all claims of employees of the salmon packing industry in the Territory of Alaska filed with the Commission and which became due and payable by virtue of the judgment and decree of this Court of May 12, 1954; and that the excess of the impounded funds, if any, over and above the amount required to pay the aforesaid claims, shall be covered into the regular fund of the Employment Security Commission of Alaska to be made applicable to payment of claims of other bona fide claimants as prescribed by law.

Done in open court this 13th day of August, 1956.

/s/ RAYMOND J. KELLY,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed August 13, 1956.

[Title of District Court and Cause.]

ORDER

Pursuant to oral stipulation by counsel in open Court which was reduced to writing by the Court Reporter, it was mutually agreed that the following Order may be entered:

It Is Hereby Ordered

That the "Order for Impounding of Funds Pending Appeal" dated June 25, 1954, filed and entered in this Court on June 25, 1954, and all conditions

therein set forth be, and the same is hereby continued in full force and effect until the United States Supreme Court ultimately disposes of the Appeal taken to it by the Appellant, A. B. Phillips, Executive Director, Employment Security Commission of Alaska, from the judgment of the Court of Appeals of the Ninth Circuit dated June 21, 1956, denying Appellant's Petition for rehearing.

It Is Further Ordered

That execution on the judgment of this Court which judgment was signed and filed on August 13, 1956, pursuant to mandate from the Court of Appeals of the Ninth Circuit be, and the same is hereby stayed until the Supreme Court of the United States ultimately disposes of the Appeal above referred to.

Signed in open Court this 18th day of September, 1956.

/s/ RAYMOND J. KELLY,
District Judge.

Entry of above Order approved:

/s/ JOHN H. DIMOND, of
Faulkner, Banfield & Boochever, Attorneys for Appellees, Fidalgo Island Packing Company and Intervenor, Clara Wilson.

/s/ EDWARD A. MERDES,
Assistant Attorney General of Alaska, Attorney for Appellant, A. B. Phillips, Executive Director, Employment Security Commission of Alaska.

[Endorsed]: Filed September 18, 1956.

[Title of District Court and Cause.]

NOTICE OF SUBMISSION OF ORDER REIN-
STATING JUDGMENT ON MANDATE

To: J. Gerald Williams, Attorney General of
Alaska, attorney for defendant:

Please take notice that an order reinstating the
judgment on the mandate in the above cause, of
which the attached is a true copy, will be submitted
for entry and settlement to the above-entitled Court,
at Juneau, Alaska, on January 18, 1957, at 10 a.m.

Dated: January 7, 1957.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ JOHN H. DIMOND,
Attorneys for Plaintiff and
Intervenor.

[Title of District Court and Cause.]

ORDER REINSTATING JUDGMENT
ON MANDATE

This Matter came on before the Court upon the
oral stipulation of counsel for all parties to rein-
state and permit execution upon the judgment on
mandate entered by this Court on August 13, 1956.

It appears to the Court:

1. On July 3, 1956, the United States Court of Appeals for the Ninth Circuit entered its mandate in which the judgment of the District Court of May 12, 1954, was affirmed, which mandate was filed in this Court on July 6, 1956.

2. A judgment on said mandate was entered by this Court on August 13, 1956.

3. On September 18, 1956, this Court entered its order staying execution on the judgment on mandate of August 13, 1956, and continuing in full force and effect the "Order for Impounding Funds Pending Appeal" dated June 25, 1954, until the Supreme Court of the United States had ultimately disposed of the defendant's application for a writ of certiorari.

4. On December 10, 1956, the said application for writ of certiorari was denied by the Supreme Court of the United States.

Now, Therefore, it is hereby Ordered:

1. This Court's order of September 18, 1956, is hereby rescinded and revoked and henceforth shall have no further force and effect.

2. The judgment on mandate of this Court, dated August 13, 1956, is hereby reinstated in full and placed in full force and effect, with the following additional provisions to be added thereto:

(a) The said impounded funds shall be used by the Employment Security Commission not only to pay all claims of employees of the salmon packing

industry in the Territory of Alaska filed with the Commission and which became due and payable by virtue of the judgment and decree of this Court of May 12, 1954, but also to pay interest on said claims at the rate of six (6%) per cent per annum from May 12, 1954.

(b) Plaintiff and intervenor are allowed attorney's fees in the amount of \$.....

Done in Open Court at Juneau, Alaska, this day of, 1957.

.....,

District Judge.

Service of copy acknowledged.

[Endorsed]: Filed January 7, 1957.

[Title of District Court and Cause.]

OPINION

Filed January 21, 1957

This matter is before the Court upon oral stipulation of counsel for all parties to reinstate and permit execution upon the judgment on mandate entered by this Court on August 13, 1956. In addition, counsel for plaintiff requests that interest be allowed thereon at 6% from May 12, 1954, and that the Court allow a reasonable attorney fee.

On June 29, 1953, the then Acting Director of the Employment Security Commission of Alaska

promulgated what was called "Amended Regulation No. 10." This regulation purported to fix and designate seasons of employment in the canned salmon industry in Alaska, which meant that unemployment benefits could be paid to canned salmon employees only during the "seasons," i.e., during the months generally of May through September. Thus, under this regulation, if such employee were out of work between October and May of any year, he would not be eligible to draw unemployment compensation benefits.

This action was commenced on or about July 30, 1953, to enjoin the enforcement of this purported regulation on the ground, principally, that it unlawfully discriminated against the salmon packers in Alaska and their employees in favor of other Alaska employers and their employees—such as the persons in the construction industry. The District Court, on May 7, 1954, filed its opinion sustaining the contentions of plaintiff and intervenor. In this opinion the Court held that the regulation was invalid, was discriminatory in its application and operation, and that plaintiff and intervenor have been irreparably injured and therefore were entitled to an injunction. Hence, on May 12, 1954, the District Court entered its judgment and decree permanently enjoining the Director of the Employment Security Commission, and his agents and employees and successors in office, from—

“* * * doing any act or thing for the purpose of enforcing or putting into effect purported

Amended Regulation No. 10 of the Employment Security Commission of Alaska which is dated June 29, 1953, and which pretends to set up seasons of employment of all those persons and corporations engaged in salmon packing in Alaska* * *”

The opinion of the District Court is reported at 120 F. Supp. 777, 15 Alaska 15.

An Appeal was filed on June 11, 1954, by the Employment Security Commission, and subsequently a stay of execution was issued, tying up the accrued unemployment compensation which became due to the cannery workers when Amended Regulation 10 was declared invalid. In lieu of a supersedeas bond as required by Rule 73(d) FRCP, the sum of \$650,000.00 from the unemployment compensation trust was impounded by this court pending the appeal.

On September 13, 1955, in a per curiam opinion, the Court of Appeals for the Ninth Circuit affirmed the judgment and decree of the District Court. A petition for rehearing was denied on June 21, 1956, and a petition for a writ of certiorari to the United States Supreme Court, filed September 21, 1956, was denied on December 10, 1956.

Thus the benefits to the cannery workers have been delayed nearly three years since the District Court first determined that Amended Regulation No. 10 was invalid, and plaintiff now seeks interest on the benefits, and attorney fees for prosecuting this action. He contends that the scope of the man-

date from the United States Court of Appeals did not include these items and that this Court can, and moreover, it should, make such an award at this time.

The entire Employment Security Act was repealed and re-enacted by Chap. 5 of the First Extraordinary Session Laws of Alaska of 1955. Sec. 1001 thereof provides:

“Section 1001. Non-Liability of Territory. Benefits shall be deemed to be due and payable under this Act only to the extent provided in this Act and to the extent that moneys are available therefor to the credit of the Unemployment Fund, and the liability of the Territory and the Commission shall be limited accordingly.”

The rights and liabilities of the parties herein must be determined by the law as it existed at the time the controversy arose. Sec. 51-5-19 ACLA, 1949, provides:

“Benefits shall be deemed to be due and payable under the Act only to the extent provided in the Act and to the extent that moneys are available therefor to the credit of the Employment Security Fund, and neither the Territory nor the Commission shall be liable for any amount in excess of such sums.”

Sec. 25-1-1 ACLA, 1949, cited by the plaintiff, provides that “The rate of interest in the Territory of Alaska shall be six per centum per annum, and

no more, on all moneys after the same become due* * *”

Section 55-11-51 ACLA, 1949, likewise provides for attorney fees. It reads: “The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action or defense thereto, which allowances are termed costs.”

These general provisions of the law are subject to the limitation that when a sovereign state is involved in a suit, its liability for interest or costs must be specifically set forth in a statute. The designation “sovereign state” would include the Territory of Alaska. See *Territory ex rel McMahon v. O'Connor*, 5 Dak. 397, 41 N.W. 746.

With regard to plaintiff's application for interest, the case of *United States v. North Carolina*, 136 U. S. 211, sets forth the rule that “* * * the State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid.” This holding has been widely supported in other jurisdictions: *United States v. Nez Perce County, Idaho* (9th Circ., 1938), 95 F 2nd 238; *Boxwell v. Department of Highways*, 14 So. 2nd 627, 203 La. 760; *State Highway Commission v. Mason*, 6 So. 2nd 468, 192 Miss. 576; *Culver v. Commonwealth*, 35 A. 2nd 64, 348 Pa. 472.

A similar rule has been followed by the courts on the question of costs. In *Ridge v. Boulder Creek Union Junior-Senior High School District of Santa Cruz County*, 140 P. 2nd 990, 60 Cal. App. 2nd 453, the Court stated:

“General statutes allowing costs to parties have been construed not to apply to the state in the absence of express provision respecting costs where the state was a party.”

See also *Boland v. Cecil*, 150 P. 2nd 819; *Costs*, 14 Am. Jur., 22, Sec. 34; *Territories*, 86 C.J.S. 647, Sec. 38.

That provisions for interest or costs must be provided for specifically in a statute may be shown not only from the case law on the subject, but also from the wording of the Alaska Employment Security Act itself, Sec. 51-5-19, ACLA, 1949, *supra*. There is no provision for anything in addition to unemployment benefits in Alaska's Employment Security Act.

Plaintiff contends that the suit was brought against the Director of the Employment Security Board as an individual, and that consequently the action does not involve the territory of Alaska. But the Court cannot agree with that distinction. The Commission was performing an essential governmental function, and, in fact, as was pointed out in defendant's brief, the director was acting on legislative mandate in promulgating Amended Regulation No. 10. We must hold that the Director and

the Commission were clothed with the sovereignty of the Territory in connection with the matter. No interest can be awarded nor can any costs be allowed.

Counsel for plaintiff contends that under the salvage doctrine, attorney fees should be awarded from the fund which is recovered. It is well settled that in class suits, such as this one, they are entitled to receive their compensation from that source. Trustees v. Greenough, 105 U. S. 527; Sprague v. Ticonic Nat'l Bank, 307 U. S. 161; Central R. R. & Banking Co. of Georgia v. Pettus, 113 U. S. 116. Since the entire class benefits by the litigation, each member is required to contribute his proportionate share of the expense. This amount is deducted before distribution, as a matter of convenience.

We do not feel that Sec. 55-11-51, ACLA, 1949 (*supra*), creates any obstacle to the application of this doctrine. In leaving the measure and mode of compensation up to the parties, the legislature certainly did not contemplate the restriction of attorney fees to the amount which a single plaintiff could afford, or was willing to pay. By their nature, class suits of this general type involve a number of individuals who have claims which by themselves are not large enough to justify litigation, but which, when prosecuted aggregately, confer a true benefit on the class. The desirability of such a remedy is obvious, but if a reasonable attorney fee is not to be allowed from the judgment, class suits become impractical. No one person could afford to maintain

an action of such large proportions, in view of the limited benefits which he would personally gain.

It is, therefore, the judgment of this Court that the awards which have been recovered in this action should be charged with a reasonable percentage of the amount recovered by each claimant, which will constitute reasonable attorney fees to be awarded to the attorney herein as compensation. The Court finds that 3% is a reasonable amount and should be deducted from each award and paid to the attorney. Order reinstating judgment on the mandate in accordance with this opinion may be prepared and presented to this Court.

/s/ RAYMOND J. KELLY,
U. S. District Judge.

[Endorsed]: Filed January 21, 1957.

[Title of District Court and Cause.]

NOTICE OF TIME FOR SUBMISSION OF
ORDER FOR ENTRY

To: J. Gerald Williams, Attorney General of
Alaska, attorney for defendant:

Please take notice that an "Order Reinstating Judgment on Mandate and for Payment of Attorneys' Fees and Claims," of which the attached is a true copy, will be submitted for entry to the above-entitled Court, at Juneau, Alaska, on February 8, 1957, at 10:00 a.m.

Dated: January 31, 1957.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ JOHN H. DIMOND,
Attorneys for Plaintiff and
Intervenor.

[Title of District Court and Cause.]

ORDER REINSTATING JUDGMENT ON MAN-
DATE AND FOR PAYMENT OF ATTOR-
NEYS' FEES AND CLAIMS

This Matter came on before the Court on January 18, 1957, upon the oral stipulation of counsel for all parties to reinstate and permit execution upon the judgment on mandate entered by this Court on August 13, 1956, and upon plaintiff's and intervenor's petition for the payment of interest on the claims of employees of the salmon packing industry in Alaska which became due and payable by virtue of the judgment and decree of this Court on May 12, 1954, and for the allowance of attorneys' fees to be paid to the attorneys for plaintiff and intervenor.

It appears to the Court:

1. On July 3, 1956, the United States Court of Appeals for the Ninth Circuit entered its mandate in which the judgment of the District Court of May 12, 1954, was affirmed, which mandate was filed in this Court on July 6, 1956.

2. A judgment on said mandate was entered by this Court on August 13, 1956.

3. On September 18, 1956, this Court entered its order staying execution on the judgment on mandate of August 13, 1956, and continuing in full force and effect the "Order for Impounding Funds Pending Appeal," dated June 25, 1954, until the Supreme Court of the United States had ultimately disposed of the defendant's application for a writ of certiorari.

4. On December 10, 1956, the said application for writ of certiorari was denied by the Supreme Court of the United States.

5. On January 21, 1957, the Court filed its written opinion denying the petition for payment of interest and costs, and directing that the funds heretofore impounded by order of this Court of June 25, 1954, and now available to pay all claims of employees of the salmon packing industry in Alaska filed with the Employment Security Commission and which became due and payable by virtue of the judgment and decree of this Court of May 12, 1954, be charged with 3% of the amount of each such claim and deducted from each such claim and paid as compensation to plaintiff's and intervenor's attorneys as attorneys' fees, which include expenses of litigation.

Now, Therefore, It Is Hereby Ordered:

1. This Court's order of September 18, 1956, is hereby rescinded and revoked and henceforth shall have no further force and effect.

2. The judgment on mandate of this Court, dated August 13, 1956, is hereby reinstated and placed in full force and effect, subject, however, to the following modifications:

(a) The said impounded funds, in the total amount necessary to pay all claims of employees of the salmon packing industry in Alaska filed with the Commission and which became due and payable by virtue of the judgment and decree of this Court of May 12, 1954, shall be used to pay all such claims, after deducting therefrom the sum of three (3%) per cent thereof as compensation for plaintiff's and intervenor's attorneys.

(b) The present Executive Director of the Employment Security Commission, the successor in office to defendant A. B. Phillips, is hereby ordered to pay said attorneys' fees to plaintiff's and intervenor's attorneys, Faulkner, Banfield & Boochever, of Juneau, Alaska, within 30 days from the date of this order.

(c) The excess of the said impounded funds, over and above the amounts necessary to pay the aforesaid attorneys' fees, expenses and claims, shall be covered into the regular fund of the Employment Security Commission of Alaska to be made applicable to payment of claims of other bona fide claimants as prescribed by law.

(d) Plaintiff's and intervenor's petition for the awarding of interest on the said claims is denied.

Done in Open Court at Juneau, Alaska, this
day of, 1957.

.....,

District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed January 31, 1957.

[Title of District Court and Cause.

PETITION FOR REHEARING

To: The Honorable Raymond J. Kelly, United
States District Judge for the District of Alaska,
Division Number One, at Juneau:

The defendant above named presents this, a Petition for Rehearing of argument upon the limited question of allowance of attorney fees in any way from moneys now in, or required to be deposited in, Alaska's account in the Unemployment Trust Fund including moneys heretofore "impounded" in this action. By this Petition the defendant particularly seeks the opportunity to advise the Court on the effect that entry of an Order based upon its Opinion dated January 21, 1957, would have upon conformity of Alaska to Federal requirements for credits allowable to Alaska employers against their Federal Unemployment Tax.

In Support of This Petition, the defendant respectfully submits the following:

On January 18, 1957, in this Court, hearing was had upon plaintiff's submission of an Order Reinstating Judgment on Mandate. Prior to said hearing and in connection therewith, plaintiff had filed with the Court a Memorandum in Support of Application for Interest and Attorney's Fees and defendant had filed a memorandum in reply thereto, setting out affirmative arguments against allowance of interest and attorney fees. Based upon these memoranda and upon the oral argument thereon heard by this Court on January 18, 1957, the Court on January 21, 1957, filed its Opinion, recognizing that attorney fees are a part of "costs," and that "no interest can be awarded nor can any costs be allowed" against the defendant in this action. It appears from a careful study of the Court's Opinion, however, that the Court felt that an allowance of attorney fees as a deduction from each claim under the "salvage" theory would be proper in law, since it would not conflict with sovereign immunity from the payment of costs (the term to include attorney fees).

In its reply memorandum on this subject at Page 13, defendant made the single statement "It is required * * * that all moneys withdrawn from this [unemployment trust] fund be used exclusively for the payment of benefits and refunds (Section 3304 (a) (4) Internal Revenue Code of 1954)." The defendant feels that it did not, by this single statement, meet its obligation to fully advise the Court of the law as it would apply to a requirement that

the defendant deduct 3% of each claim in this action and pay over the same to plaintiff's attorneys.

For this reason the defendant earnestly submits that a rehearing of argument upon this limited question should be allowed, in order that this Court have an opportunity to study the complicated Federal law which imposes an absolute prohibition against the defendant's paying out the moneys in question in the manner and for the purpose which the Court, in its Opinion filed January 21, 1957, holds to be proper.

The defendant further submits that, since major questions of law affecting the content of the proposed Order Reinstating Judgment on Mandate are to be argued and developed in rehearing, entry of such Order should be delayed until the Court has been fully advised in the matter by way of rehearing.

Filed herewith in the form of a memorandum of law is a summary of the matters defendant wishes to present to the Court in rehearing.

Respectfully submitted this 12th day of February, 1957.

J. GERALD WILLIAMS,
Attorney General of Alaska.

By /s/ EDWARD A. MERDES,
Assistant Attorney General.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1957.

[Title of District Court and Cause.

ORDER FOR REHEARING

The Court having considered defendant's Petition for Rehearing and defendant's Memorandum in support thereof, and

It Appearing to the Court that major questions of law affecting the contents of the proposed Order Reinstating Judgment on Mandate have not yet been presented to the Court, Therefore,

It Is Hereby Ordered That at the hour of 4 o'clock p.m., February 21, 1957, in this Court, argument will be heard upon the limited question of allowance of attorney fees in any way from moneys now in, or required to be deposited in, Alaska's account in the Unemployment Trust Fund, including moneys heretofore "impounded" in this action.

Notice Is Given That entry of an Order Reinstating Judgment on Mandate will be delayed until after the Court has heard said arguments.

Dated at Juneau, Alaska, this 13th day of February, 1957.

/s/ RAYMOND J. KELLY,
District Judge.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and agreed by all the parties hereto through their attorneys as follows:

That the total number of claimants claiming the benefits involved in this case is approximately 2,350; that the total number of separate claims filed is approximately 18,000; and the approximate amount of all claims is \$509,000.

It is further stipulated that these amounts may vary slightly after full and accurate computation and it is also stipulated that this stipulation may be filed in court and become a part of the record for the purpose of settling the matters in connection with the entry of final judgment on the mandate.

Juneau, Alaska, February 12, 1957.

/s/ JOHN H. DIMOND,

/s/ H. L. FAULKNER,

Attorneys for Plaintiff and
Intervenor.

/s/ J. GERALD WILLIAMS,

/s/ DICKERSON REGAN,

Attorneys for Defendant.

[Endorsed]: Filed February 15, 1957.

[Title of District Court and Cause.]

MOTION FOR ORDER OF ABATEMENT

Pursuant to Rule 25 (d), FRCP, the Defendant moves the Court for an Order declaring the above-entitled action abated for the reason that

(1) The Defendant, A. B. Phillips, then Executive Director of the Employment Security Commission of Alaska, resigned said office effective with the close of business, April 15, 1955.

(2) His successor, Arthur A. Hedges, assumed the office of Acting Executive Director effective April 16, 1955, and

(3) No substitution of Arthur A. Hedges, or any other successor in office of A. B. Phillips, as defendant in this action has been made, although the period of six months following the date when the successor of A. B. Phillips took office has long since expired.

This motion is supported by an affidavit of James B. Cauley, Fiscal and Personnel Officer of the Alaska Employment Security Commission, and by the first section of Defendant's Reply to Plaintiff's Memorandum filed February 23, 1957, which affidavit and reply memorandum are filed herewith.

Dated at Juneau, Alaska, February 28, 1957.

/s/ J. GERALD WILLIAMS,
Attorney General of Alaska,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 28, 1957.

[Title of District Court and Cause.]

OPINION

Filed March 14, 1957

This matter comes before the Court upon the petition of defendant for a rehearing upon the question of allowance of attorney fees in any way from moneys now in or required to be deposited in Alaska's account in the unemployment trust funds, including money heretofore impounded in this action. The defendant admits in its petition that it did not fully advise the Court on the law as it would apply to a requirement that the defendant deduct a percentage of each claim in this action and pay the same over to plaintiff's attorney as compensation for the services rendered in procuring the benefits for all these claimants under the "salvage" theory. This theory, as argued by counsel for plaintiff at the hearing, would not conflict with the sovereign's immunity from the payment of costs and taxable attorney fees. Counsel for defense did not argue against this proposal of plaintiff's counsel at the former hearing and mentioned only briefly in his memorandum filed in connection therewith that the law required that all moneys withdrawn from the unemployment trust fund must be used exclusively for the payment of benefits and refunds, so in effect the question here involved is now before the Court for the first time.

Rehearing was granted and on the argument counsel for plaintiff pointed out that Sec. 762 of the

Employment Security Act of the Extraordinary Session Laws of Alaska, 1955, authorizes the Court to designate attorney fees. It should be pointed out that the provisions of the Act as amended in 1955 are applicable on the question of attorney fees, notwithstanding the fact that the substantive rights of the parties were governed by the law as it existed when the controversy arose. See *Hogan v. Ingold* (Cal., 1952), 243 P. 2d 1, 96 ALR 1428.

Section 762 provides in part as follows:

“Limitation of Fees. No individual claiming benefits shall be charged fees of any kind in any proceeding under this Act by the Commission or its representatives, or by any Court or any officer thereof. Any individual claiming benefits in any proceeding before the Commission or its representatives or a court may be represented by counsel or other duly authorized agent; but no such counsel or agent shall either charge or receive for such services more than an amount approved by the Commission or the court * * *

It would surely seem that the authorization of attorney fees by the Court as well as the Commission is contemplated in appeals by individual claimants from decisions of the Commission, but in the present case, the Fidalgo Island Packing Co. cannot be considered as a claimant within the meaning of the statute, since it merely sought an injunction forbidding the enforcement of amended regulation 10.

This Court, in the Opinion filed herein on January 21, 1957, and to which reference is hereby made, held that provisions for interest or costs in a case against the sovereign must be provided for specifically in a statute; that there is no provision for anything in addition to unemployment benefits in Alaska's Employment Security Act in effect at the time this action arose and that the Director and the Commission were clothed with the sovereignty of the Territory of Alaska and that no interest could be awarded nor could attorney fees as costs be allowed.

The Court then went on in that Opinion to hold on the basis of plaintiff's brief and arguments at the hearing that under the "salvage" doctrine, attorney fees should be awarded from the funds which were recovered for each claimant and although it is well settled that in class suits attorneys would be entitled to receive their compensation in that manner, the Court is compelled to change its holding on this particular matter because Section 763 of the Alaska Employment Security Act, *supra*, provides as follows:

"Exemption of Benefits. Any assignment, pledge, or encumbrance of any rights to benefits which are or may become due or payable under this Act shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received by any individual, so long as they are

not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred or necessities furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this section shall be void.” (Emphasis supplied.)

It seems to the Court that the important provision of this section, so far as this hearing is concerned, is the following:

“* * * so long as they are not mingled with other funds of the recipient.”

Until the funds become so mingled, the exemptions listed in Sec. 763 (*supra*) preclude the impressing of the benefits due the claimants with any lien whatsoever. These funds have not been so mingled and cannot be until they have been actually paid over to each claimant. This Court was therefore incorrect in holding that the “salvage” theory as advanced by plaintiffs could apply to unemployment compensation benefits.

The legislature has determined that although the Court may decide what is a just attorney fee, the social purpose of the Employment Security Act would be impaired if the attorney fee were to constitute a lien upon the benefits. The Court has no choice but to take the law as it finds it. It is clear that the allowance of attorney fees as ordered by this Court is forbidden by the statute, and accord-

ingly the decree of January 21, 1957, must be modified to that extent.

Counsel for plaintiffs presented very potent arguments based on the extensive power of an equity court and correctly observed that the equitable maxim that "equity follows the law" is more honored in the breach than the observance. However, the maxim quoted is strictly applicable whenever the rights of the parties are clearly defined and established by statute, and courts of equity cannot disregard statutory provisions any more than courts of law. Whenever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules.

Defendant also files in connection with this hearing a Motion for Order of Abatement in which the defendant moves for an Order declaring the above-entitled action abated for the reason that the defendant, A. B. Phillips, who was Executive Director of the Employment Security Commission of Alaska, resigned said office April 15, 1955. Defendant admits that the Court recognized this action as one against the sovereign, the Territory of Alaska, but claims that under Rule 25(d), F.R.C.P., an action is abated when six months expire after the resignation of an individual officer of the sovereign without substitution of a successor as defendant. This question, likewise, is raised for the first time at this hearing.

This Court feels, however, that it is not within its province at this time to consider this question,

as this entire proceeding is before us on a mandate of the 9th Circuit Court of Appeals. I feel that it is the duty of this Court to enter a decree in conformity with the appellate court's mandate, and to do nothing contrary to it or vary it in any way.

In Re Sanford Fork & Tool Co.,

160 U. S. 247;

Clarke v. Hot Springs Electric Light &
Power Co., 76 F. 2d 918; certiorari denied,
296 U. S. 624

A distinction must be made between the requested declaration of abatement and our former action of allowing attorney fees. It is well settled that the trial court may consider the question of attorney fees when acting upon the mandate of an appellate court, if such discretion is expressly or impliedly conferred in the mandate. *Sprague v. Ticonic National Bank*, 307 U. S. 161. While the consideration of attorney fees is a collateral proceeding, the matter of abatement directly involves the validity of the mandate, and it cannot be considered without leave of the Court of Appeals. See *In re Potts*, 166 U. S. 263.

Motion for Order of Abatement is denied. Order reinstating Judgment on the Mandate, without interest, costs, or attorney fees, may be presented in accordance with this opinion.

/s/ RAYMOND J. KELLY,
U. S. District Judge.

[Endorsed]: Filed March 14, 1957.

In the District Court for the District of Alaska,
Division Number One, at Juneau

No. 6865-A

FIDALGO ISLAND PACKING COMPANY, a
Corporation,

Plaintiff,

vs.

A. B. PHILLIPS, Executive Director, Employ-
ment Security Commission of Alaska,

Defendant,

CLARA WILSON,

Intervenor.

ORDER REINSTATING JUDGMENT OF MANDATE

This Matter came on before the Court upon presentation to the Court by plaintiff and intervenor of a proposed Order reinstating the judgment on the mandate entered by this Court on August 13, 1956, and requesting allowance of attorney's fees and upon the objections of defendant to allowance of attorney fees as provided for in the Court's Opinion filed January 21, 1957, or otherwise; and upon the petition of defendant for a rehearing upon the question of allowance of attorney fees in any way from moneys now in, or required to be deposited in, Alaska's account in the Unemployment Trust Fund or from the Administrative fund of defendant including moneys heretofore impounded herein, and upon defendant's motion for an order of abatement.

It appears to the Court:

1. On July 3, 1956, the United States Court of Appeals for the Ninth Circuit entered its mandate in which the judgment of the District Court of May 12, 1954, was affirmed, which mandate was filed in this Court on July 6, 1956.

2. A judgment on said mandate was entered by this Court on August 13, 1956.

3. On September 18, 1956, this Court entered its order staying execution on the judgment on mandate of August 13, 1956, and continued in full force and effect the "Order for Impounding Funds Pending Appeal," dated June 25, 1954, until the Supreme Court of the United States had ultimately disposed of the defendant's application for a writ of certiorari.

4. On December 10, 1956, the said application for writ of certiorari was denied by the Supreme Court of the United States.

5. On January 21, 1957, the Court filed its written opinion denying plaintiff's and intervenor's petition for payment of interest and costs, but providing for an attorney's fee to be deducted from each claim which became payable by virtue of the judgment and decree of this court on May 12, 1954.

6. On March 14, 1957, after hearing of argument upon the allowance of attorney's fees, the Court filed its written opinion providing for reinstatement of Judgment on the Mandate, without interest, costs or attorney's fees and denying defendant's Motion for Order of Abatement.

Now, Therefore, It Is Hereby Ordered:

1. This Court's judgment on the Mandate, dated August 13, 1956, is hereby reinstated with the following exceptions: That the funds impounded in this action by order of the Court, dated June 25, 1954, be held impounded under that Order for a period of thirty days from the date hereof, and if, at the expiration of that period, no appeal is taken by plaintiff and intervenor from this Judgment and Order to the U. S. Court of Appeals for the Ninth Circuit, the impounded funds be released, and so much thereof as may be necessary to satisfy in full the pending claims of all claimants, according to their respective claims, be paid them forthwith by the defendants. If an appeal is taken within thirty days, all impounded funds shall remain impounded pending the outcome of the appeal or the further Order of this Court.

2. No interest, costs or attorneys' fees are allowed to plaintiff or intervenor.

3. Defendant's Motion for Order of Abatement is denied.

Done in Open Court, at Juneau, Alaska, March 19, 1957.

/s/ RAYMOND J. KELLY,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Given that Fidalgo Island Packing Company, plaintiff above named, and Clara Wilson, intervenor, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the order reinstating judgment on mandate, signed and filed herein on March 19, 1957, and from that portion thereof only, which denies interest and attorney's fees and from the refusal of the court to enter the form of order to reinstate the judgment on the mandate which was submitted to the court by plaintiff and intervenor on January 7, 1957.

Dated at Juneau, Alaska, this 2nd day of April, 1957.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ H. L. FAULKNER,

By /s/ JOHN H. DIMOND.

Receipt of copy acknowledged.

[Endorsed]: Filed February 3, 1957.

[Title of District Court and Cause.]

STIPULATION RE PRINTING OF RECORD
AND USE OF PRINTED RECORD ON AP-
PEAL IN FORMER HEARING

It Is Stipulated and agreed between counsel for plaintiff and intervenor and for defendant that in

the printing of the record in this case for use on appeal the title and number of the cause may be omitted from all papers except the first paper appearing in the record and that there be inserted only the words "Title of District Court and Cause."

It Is Further Stipulated, in the consideration of this case on appeal in the United States Court of Appeals for the Ninth Circuit, that reference may be made to the printed record in Cause No. 14,505 entitled A. B. Phillips, Executive Director, Employment Security Commission of Alaska, Appellant, vs. Fidalgo Island Packing Company, a Corporation, and Clara Wilson, Intervenor, Appellees, and that reference may be made by appellants and appellees to any or all portions of that record in the preparation of their briefs and in the argument and that the court may consider that printed record for its own information on any point involved in the appeal where reference may be necessary to the printed record in that case.

Dated at Juneau, Alaska, this 2nd day of April, 1957.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ JOHN H. DIMOND,

By /s/ H. L. FAULKNER,

Attorneys for Appellant and
Intervenor.

/s/ DICKERSON REGAN,

Of Attorneys for Appellee.

[Endorsed]: Filed February 3, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
RE DOCKET ENTRIES

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify:

That in the above-entitled case the docket entries in the office of the Clerk of the Court, made from and after August 13, 1956, show the following items:

August 13, 1956—Judgment on Mandate, signed and filed.

September 18, 1956—Order staying judgment on mandate and execution pending application to Supreme Court for writ of certiorari.

September 25, 1956—Motion of defendant for order to release part of impounded funds.

September 28, 1956—Order denying motion for release of impounded funds.

January 7, 1957—Form of order to reinstate judgment on mandate with modification, filed by plaintiff and intervenor.

January 18, 1957—Motion called on motion calendar to hear plaintiff's motion to sign amended judgement on mandate.

January 21, 1957—Opinion filed denying interest to claimants and allowing reinstatement of judgment

on mandate with attorney's fee of three per cent of the amount of all claims, to be deducted from the claims of claimants.

February 13, 1957—Defendant's petition for rehearing on opinion of January 21, 1957, filed, and order for hearing on petition filed and entered.

February 28, 1957—Motion of defendant for order of abatement, argument on this motion and defendant's petition for rehearing.

March 14, 1957—Second opinion of court reversing former opinion and denying attorney's fees and denying defendant's motion for abatement.

March 18, 1957—Form of order reinstating judgment on mandate with modifications in accordance with court's second opinion, filed.

March 19, 1957—Court signed order reinstating judgment on mandate, disallowing interest and attorney's fees and denying defendant's motion for abatement and continuing impoundment of funds pursuant to the order of this court of June 25, 1954, for a period of 30 days additional.

Dated at Juneau, Alaska, this 3rd day of April, 1957.

[Seal] /s/ J. W. LEIVERS,
Clerk of the District Court, District of Alaska
Division Number One.

Receipt of copy acknowledged.

[Endorsed]: Filed February 3, 1957.

[Title of District Court and Cause.]

COST BOND ON APPEAL

The above-named plaintiff Fidalgo Island Packing Company and Clara Wilson, intervenor, as principals, and the United States Fidelity & Guaranty Company, a Maryland corporation, as surety, jointly and severally acknowledge that they and their successors, assigns, executors and administrators are jointly and severally bound unto the above-named defendant in the sum of \$250.00.

The condition of this bond is as follows:

Whereas, the plaintiff, Fidalgo Island Packing Company, a corporation, and Clara Wilson, intervenor, have appealed to the United States Court of Appeals for the Ninth Circuit from the final judgment and order reinstating the judgment on the mandate, which order of reinstatement is dated March 19, 1957;

Now, Therefore, if the above-named plaintiff and intervenor shall prosecute their appeal to effect and pay all costs that may be adjudged against them or either of them, if the appeal is dismissed or the judgment and order are affirmed then this bond shall be void; otherwise, to be and remain in full force and effect.

Dated at Juneau, Alaska, this 3rd day of April, 1957.

FIDALGO ISLAND PACKING
COMPANY,

A Corporation;

By /s/ H. L. FAULKNER,

Its Agent and Attorney;

CLARA WILSON,

Intervenor;

By /s/ H. L. FAULKNER,

Her Agent and Attorney,

Plaintiff and Intervenor.

[Seal]

UNITED STATES FIDELITY

& GUARANTY COMPANY,

By /s/ [Indistinguishable],

Agent and Attorney-in-Fact.

Executed in the presence of Jennie S. Hartman.

Receipt of copy acknowledged.

[Endorsed]: Filed February 3, 1957.

[Title of District Court and Cause.]STATEMENT OF POINTS TO BE
RELIED ON BY APPELLANTS

The appellants, the plaintiff and intervenor in the above-entitled cause, propose on their appeal to the U. S. Court of Appeals for the Ninth Circuit to rely on the following points as error:

1. The court erred in denying interest to the claimants as proposed in the order of plaintiff and intervenor presented to the court and dated January 7, 1957.

2. The court erred in denying interest to the claimants in the above-entitled cause as set forth in the opinion of the court of January 21, 1957.

3. The court erred in the opinion of March 14, 1957, in denying interest to claimants and in deny

ing attorney's fees to appellants either under the salvage doctrine as discussed in the court's first opinion of January 21, 1957, or from the administrative fund of defendant and the Employment Security Commission of Alaska by holding that the plaintiff was not a claimant.

4. The court erred in refusing to allow interest or attorney's fees in the order reinstating the judgment on the mandate, which order is dated and filed March 19, 1957.

Dated at Juneau, Alaska, this 2nd day of April, 1957.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ JOHN H. DIMOND,

By /s/ H. L. FAULKNER,

Attorneys for Plaintiff and
Intervenor.

Receipt of copy acknowledged.

[Endorsed]: Filed February 3, 1957.

[Title of District Court and Cause.]

ORDER CONTINUING THE IMPOUNDMENT
OF FUNDS PENDING APPEAL

In the above-entitled cause it appearing to the court that on June 25, 1954, this court made an order impounding the sum of \$650,000 to pay the claims of claimants which would be due and payable to them under the judgment of this court if affirmed by the United States Court of Appeals, and

It appearing that the judgment was affirmed and the Supreme Court of the United States denied certiorari and that the sum of approximately \$509,000 is due claimants as a result of this action and in accordance with the opinions and judgments herein of this court and the Court of Appeals, and that there may be involved in the appeal the question of interest on these claims, and

It further appearing that defendant will be in no wise affected if the impoundment of the funds is continued pending the appeal,

Now, Therefore, on motion of the attorneys for plaintiff and intervenor presented to the court pursuant to the rules of the court, it is hereby Ordered:

That pending the outcome of the appeal to the U. S. Court of Appeals on the matter of attorney's fees and interest, execution on the judgment be stayed, and the funds impounded by the order of this court of January 25, 1954, be continued to be held and impounded pursuant to the terms of that order until the United States Court of Appeals for the Ninth Circuit has disposed of the appeal now pending.

Done in Open Court this 5th day of April, 1957.

/s/ RAYMOND J. KELLY,
Judge.

Approved as to form, and copy received this 5th day of April, 1957.

/s/ DICKERSON REGAN,
Of Attorneys for Defendant.

[Endorsed]: Filed April 5, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Order of the Court filed in the above-entitled action and are the ones designated by the parties hereto to constitute the record on appeal.

In witness whereof, I have hereunto set my hand and caused the seal of the above-entitled Court to be affixed at Juneau, Alaska, this 5th Day of April, 1957.

[Seal] /s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 15510. United States Court of Appeals for the Ninth Circuit, Fidalgo Island Packing Company, a Corporation, and Clara Wilson, Appellants, vs. A. B. Phillips, Executive Director, Employment Security Commission of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed April 8, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

